'Sales' on Retention of Title terms: is the English law analysis broken?[1]

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1. Introduction

Hard cases make bad law. The history of the *Bunkers* litigation[2] in the English courts demonstrates, as is often the case, that the history and context of litigation can have a strong and decisive effect on both the result and the legal reasoning leading to that result. This article argues that, while the decision of the Supreme Court in the *Bunkers* case was understandable given its context and background, it, together with the decision of the Court of Appeal in *Caterpillar v Holt*,[3] has led to such uncertainty surrounding the use of retention of title ('ROT') clauses in inventory financing, that it is time for a reanalysis of the legal position. This article sets out suggested options for that reanalysis, some more radical than others.

The second section of this article analyses the current law on retention of title clauses, and sets it in the context of secured finance. The third discusses the *Caterpillar* litigation, the fourth, the *Bunkers* litigation and the fifth looks at the wider ramifications of both decision. The sixth examines three possible reanalyses, and the seventh section concludes.

2. Background to Retention of Title

a) Financial background

Most of the participants in the world of debt finance are borrowers, lenders, or, often, both. 'Lenders' encompasses all those who provide finance, whether through actual loans, buying bonds, buying receivables, granting finance leases or otherwise. What all these lenders have in common is that they lend in order to make money out of the provision of finance. This is true even for consumers lending to banks or building societies, or, more directly, through peer-to-peer lending sites, as well as for professional financiers. They are in the business of lending, and choose to earn money that way. We can call this type of credit 'lender credit'. The means by which they protect themselves against credit risk, including taking a proprietary interest in collateral, are part of the lending operation. While they may choose one legal form over another for various reasons, the main driver for that choice is the economics of their business model, which is to make as much money from lending as possible, taking into account the various risks that present themselves.

Businesses who sell goods, on the other hand, primarily make their money from selling their goods. They would be delighted if they did not have to extend credit to their purchasers; they would prefer it if their purchasers paid in advance before delivery. They only sell their goods on credit as a result

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[2] *PST Energy 7 Shipping LLC v O.W. Bunker Malta Limited* [2015] EWHC 2022 (Comm); [2016] 2 W.L.R. 1193; ('*Bunkers* first instance'); [2015] EWCA Civ 1058; [2016] 2 W.L.R. 1072 ('*Bunkers* CA'); [2016] UKSC 23; [2015] 2 Lloyd's Rep. 563 ('*Bunkers* SC')

[3] *Caterpillar (NI) Limited v John Holt & Company (Liverpool) Limited* [2012] EWHC 2477 (Comm); [2013] 1 All E.R. (Comm) 223 ('*Caterpillar* first instance'); [2013] EWCA (Civ) 1232; [2014] 1 W.L.R. 2365 ('*Caterpillar* CA')

of market imperatives, and in order to remain competitive. We can call this type of credit 'vendor credit'. This analysis applies mainly to the suppliers of inventory, that is, stock in trade (goods bought by a dealer to be resold to customers), goods bought by a buyer to be consumed in its business and raw materials (goods bought to be used in manufacture of products). Those who sell equipment usually do not usually provide credit themselves; they sell the goods to a financier who leases the goods to the business or provides them on hire purchase. The discussion in this article is therefore limited to the supply of inventory.

Purchasers demand credit for two main reasons. First, as a means of financing their own business, so that they need not pay for goods until they have had a chance to make money from then, either by selling them on or manufacturing and products from them and selling those (or, sometimes, by supplying the goods as part of the provision of services).[4] Second, because they themselves are often obliged by market forces to sell on credit, so that obtaining goods on credit finances their own provision of credit. Sellers, therefore, who extend credit do so reluctantly, and, while they try to recoup their costs in the prices they charge, they are not extending credit as their primary business.

Despite this, those providing vendor credit naturally seek to protect themselves against the credit risk of their counterparties. Since they are not in the business of lending, they do not want a method which involves high legal costs or complicated formalities. They want a method which enables business to be conducted in a normal and straightforward fashion while the buyer counterparty is solvent, but which enables the seller to have effective proprietary protection if the buyer becomes insolvent.

b) Legal background

Property in goods could originally be transferred consensually only by delivery. Two exceptions to this rule developed: property could be transferred by deed and could pass under a contract of sale without delivery if the parties so intended.[5] As a result of the latter exception, the provisions as to the passing of property in the Sale of Goods Acts 1893 and 1979[6] exemplify freedom of contract. The primary rule is that property passes when it is intended by the parties to pass, irrespective of delivery.[7] The one mandatory requirement is that property can pass only in goods which are specific or ascertained.[8] While the 'rules' in s. 18 for ascertaining the intention of the parties are default rules, subject to contrary intention, it is clear from their substance that what was envisaged at the time of drafting was that property would usually pass either before or on delivery. The seller has some inbuilt protection against non-payment before delivery in that it has the right to retain or obtain possession of the goods[9] and to resell them and pay itself out of the proceeds,[10] but after delivery, a seller who

[4] This form of trade credit can be a major plank in the provision of finance to businesses in some economies, for example, Germany, see Bundesbank, Monthly Report, October 2012 available at https://www.bundesbank.de/Redaktion/EN/Downloads/Publications/Monthly_Report_Articles/2012/2012_10_trade.pdf?__blob=publicationFile

[5] *Cochrane v Moore* (1890) 25 Q.B.D. 57 at 71 and 73 per Fry L.J.

[6] Except where indicated, the references to the Sale of Goods Act in this article are all to the 1979 Act, which is referred to as 'SGA'.

[7] S. 17 SGA.

[8] Ss.16 and 17 SGA. This is now subject to the regime introduced in 1995 relating to goods in bulk, found in ss. 20A and 20B of SGA. The latest time that goods can be ascertained is the time of delivery.

[9] Ss.39 and 41 SGA (unpaid seller's lien or right of retention if still in possession of the goods), ss.44 and 46 SGA (right of stoppage if goods are in transit and the buyer becomes insolvent).

[10] S.48 SGA.

wants protection has to bargain for it. A hint of how to do this is contained in s.19, which provides that the right of disposal may be reserved until stipulated conditions are fulfilled, in which case property does not pass until fulfilment of those conditions. Relying on ss.17 and 19, sellers have developed a powerful method of proprietary protection against counterparty credit risk by manipulating the passing of property after delivery, and providing that property shall not pass until either the price of those goods is paid or all moneys owed by the buyer to the seller are paid. This is a ROT clause.

A ROT clause is usually just one clause within the sale contract: there is rarely, if ever, a separate agreement. The buyer, then, gets everything it wants under the contract except bare title to the goods: it gets possession, and, in the case of inventory, the right to sell the goods, often the right to use the goods in manufacturing or other processes and sometimes the right to consume the goods. The seller usually will provide for the right to repossess the goods on non-payment, which, crucially, will survive the buyer's insolvency because of the seller's proprietary interest in the goods.

c) The development of ROT jurisprudence

i. The balance of interests

Since a ROT clause is a contractual provision, the development of the law in this area has occurred through a series of cases which are, in essence, cases about the interpretation of individual contracts. While progress has not been entirely made in a straight line, English law has, until recently, developed in a way which preserves a balance between the interests of those providing different types of credit and finance to a business, and which reflects to some extent the policy choices made more overtly by other regimes which have codified their law on retention of title sales.[11] The sort of business who buys inventory is likely to have some or all of three types of finance in addition to its trade finance: bank finance (secured on all the present and future assets of the company), receivables financing, and, maybe, other types of asset based financing, such as financing against inventory. It will be seen that all of the participants in this 'eco-system' are protected, to some extent, by proprietary interests in assets.[12]

There are three issues relating to the balancing of interests in this 'eco-system'. The first is whether notice of a proprietary interest is given to other creditors, who can then adjust in the light of that notice ('the publicity issue') The second is whether any such interest has priority over interests created or registered earlier ('the super-priority issue'). A later interest which has priority over an earlier interest undermines the security of the earlier creditor, but may be justified on policy grounds if it brings new value into the business.[13] The third is whether a proprietary interest is limited to the amount it secures, or whether the holder of the interest is entitled to surplus value over and above the amount of the obligation secured ('the surplus issue'). In the latter case, that surplus value is not available to other creditors and the holder of the interest obtains a windfall not justified by the bringing of new value into the business.

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[11] See L. Gullifer, 'Retention of title clauses: a question of balance' in A. Burrows and E. Peel (eds), *Contract Terms* (Oxford, Oxford University Press, 2007) 285.

[12] This formulation deliberately does not say 'assets of the debtor', since, depending on the structure used, ownership of the assets may or not be that of the debtor. This is one of the main points of discussion in this article.

[13] Or on other grounds, such as breaking the monopoly of the earlier creditor.

ii. The actual goods supplied: a simple ROT clause

The balance resulting from the English (and Scottish) cases is that trade creditors who retain title have an effective proprietary interest in the actual goods supplied: the clause will not be recharacterised as a charge, for the sole reason that it is created by reservation.[14] Due to the retention of ownership, this interest has super-priority over both other interests, whether created earlier and later. This is justified to the extent that new value is brought into the business.[15] However, at least in theory, this interest extends beyond that new value since the trade creditor is entitled to all the goods, and is under no obligation to account for surplus value. Where a ROT clause merely retains title until the price of the goods supplied is paid, this rarely makes much difference as the goods are unlikely to increase in value between the time they are supplied and when they are claimed by an unpaid seller. Furthermore, an insolvency officer of the buyer is likely to wish to keep the goods in order to sell the business as a going concern, and therefore will pay the price rather than let them be repossessed. The surplus issue is, then, not practically significant. In relation to the publicity issue, no public notice of a simple ROT clause is required in English law. This is said to be justified on the grounds that most creditors know that goods are supplied on ROT terms, and can also be justified on the basis that the burden of registering an interest in the goods themselves outweighs the benefits of registration.

iii. An 'all monies' clause

The position in law is the same in relation to an 'all moneys' clause, that is, a clause which retains title until all debts owed by the buyer to the seller are paid. Again, such a clause will not be recharacterised as a charge since it is created by reservation.[16] It therefore has super-priority over other interests, and is not registrable. The arguments as to balance, however, are rather different. Although the original supply of goods brings new value into the business, here the seller's proprietary interest continues beyond that, and may relate to debts which are not referable to new value. The interest also potentially covers goods of a much greater value than the debts to which it relates, so that, at least in theory, the lack of obligation to account for a surplus produces a greater windfall for the seller, although this is mitigated by a restitutionary obligation to restore the price already paid for any goods which are repossessed.[17] This translates, in practice, to an all moneys clause being treated as relating only to goods representing the amount outstanding at the time of the buyer's insolvency. Despite this, the wide reach of an all moneys clause means that the benefits of registration are more likely to outweigh the burden of registration.

iv. Products

The position is different when a buyer is permitted to use the goods sold in the manufacture of a product, and the seller claims to have an interest in that product.[18] If the goods have lost their identity in the making of the product (which is likely in most cases unless they can be easily separated and restored to their previous state[19]) the product will be a new thing and will be owned by the buyer,

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[14] *McEntire v Crossley Brothers Ltd* [1895] A.C. 457 at 462; *Armour v Thyssen Edelstahlwerke AG* [1991] 2 A.C. 339 at 351–2 and 354; [1990] B.C.C. 925 at 928 and 930.

[15] For more detailed discussion of the justifications for super-priority, see L Gullifer, 'Retention of title clauses: a question of balance' in A Burrows and E Peel (eds), *Contract Terms* (Oxford: Oxford University Press, 2007) 285, at 287 - 288

[16] *Armour v Thyssen Edelstahlwerke AG* [1991] 2 A.C. 339 at 351–353.

[17] On the grounds of total failure of consideration.

[18] Although in theory there could be unauthorized use, this is unlikely to happen where the goods sold are raw materials: permission to use will be either express or implied.

[19] *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick* [1984] 1 W.L.R. 485; [1984] 2 All E.R. 152.

who made it. Therefore, any interest must be created either by operation of law (tracing) or by way of grant from the buyer. The commercial nature of the sale contract means that, in the absence of an express clause, it is not appropriate to imply a term giving the seller an interest in a product,[20] nor is there a right to trace into the product, since the goods in which title was reserved have ceased to exist and there is nothing to trace.[21] Where, by contrast, there is an express clause granting the seller an interest in the product, though this could in theory be the grant of an absolute interest, it is almost inconceivable that the parties will not have intended the grant of a charge, since the value of the product will be greater than that of the goods sold, and will include not only added value from the buyer's labour, but often from other goods used in the manufacture.[22] Further, the parties will normally intend the obligation to pay the price to be able to be satisfied from any source, rather than just by the delivery up of the product or its proceeds: another badge of a charge.[23] The result of the reasoning set out in this paragraph is that either the seller has no interest at all in the manufactured goods, or that it has a charge, which will almost inevitably be void for non-registration.[24]

v. Proceeds

Where the goods sold under a ROT clause are permitted to be resold, and are sold to a sub-buyer, the sub-buyer will obtain good title to the goods under that authorised sale. The proceeds of sale belong to the buyer; if the seller is to obtain an interest in them it must, therefore, be by way of tracing or by the grant of the buyer. As with the case of products, where the contract is silent, the usual interpretation is that the buyer is selling on its own account and therefore there is no implied term that the seller should have an interest in the proceeds, nor is there a tracing right.[25] This conclusion is bolstered by the considerations mentioned above.[26] Similar considerations have led the courts to hold in a number of cases that where there is an express right to the proceeds, this creates a charge.[27]

vi. The overall picture

Thus, by a series of cases based on the interpretation of ROT clauses, it has become reasonably settled law that a seller will have no interest in products made from the goods sold, or proceeds of sale of goods (or products) either because there is no express provision for such an interest or because any express interest will be an unregistered charge, void against other secured creditors and on the

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[20] *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25 at 44 and 46; [1979] 3 All E.R. 961 at 973 and 974; *Chaigley Farms Ltd v Crawford, Kaye & Grayshire Ltd* [1996] B.C.C. 957.

[21] *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch. 25 at 41, 44 and 46.

[22] *Clough Mill Ltd v Martin* [1985] 1 W.L.R. 111 at 120 and 124; [1984] 3 All E.R. 982 at 990 and 993; *Re Peachdart Ltd* [1984] Ch. 131 at 142–143; [1983] 3 All E.R. 204 at 210; *Ian Chisholm Textiles Ltd v Griffiths* [1994] B.C.C. 96 at 102–103; [1994] 2 B.C.L.C. 291 at 299 – 300.

[23] *Modelboard Ltd v Outer Box Ltd* [1992] B.C.C. 945 at 953; [1993] B.C.L.C. 623 at 633.

[24] See 2(c)(vi).

[25] *Re Andrabell Ltd* [1984] 3 All E.R. 407; *E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd* [1988] 1 W.L.R. 150 at 160; (1987) 3 B.C.C. 608 at 614; *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 1 W.L.R. 485.

[26] 2(c)(iv).

[27] *Tatung (UK) Ltd v Galex Telesure Ltd* (1989) 5 B.C.C. 325; *E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd* [1988] 1 W.L.R. 150; *Compaq Computer Ltd v Abercorn Ltd* [1991] B.C.C. 484; [1993] B.C.L.C. 602; *Modelboard Ltd v Outer Box Ltd* [1992] B.C.C. 945. See also the Irish cases of *Carroll v. Bourke* [1990] 1 I.R. 481; [1990] I.L.R.M. 285; *Unitherm Heating Systems Ltd v Wallace* [2015] IECA 191 (transcript). Cf *Caterpillar* (Court of Appeal) discussed below.

insolvency of the buyer.[28] There is no legal reason why a seller could not register such a charge, but it is rarely, if ever, done as it is uneconomic to do so.

In relation to the issues identified in part (i) of this section, the seller cannot obtain an interest which has super-priority in a product or in proceeds. Instead, he can obtain an interest which would lose priority to previously created security or other interests, of which public notice is required. Further, if registered, the interest would be limited to the value of the outstanding debt, that is, the seller would have to account for any surplus.

The final picture, then, is that a ROT seller can obtain an interest with super-priority in goods that are sold to secure both the payment of the price of those goods and other debts, but is unlikely to obtain an interest in products manufactured from those goods or from the proceeds of sub-sale. This provides a reasonable balance in relation to other financiers, who can obtain security interests over those assets, while giving trade creditors some protection in industries where the goods themselves last for long enough to be meaningful collateral. In other industries, where goods are destroyed or lose their value quickly,[29] trade creditors have to take other steps to protect themselves, as do those trade creditors who provide services or digital content.

d) The dangers of legal development by interpretation of contracts

While it might be thought that the picture sketched out above is reasonably satisfactory, a system of proprietary protection of creditors which develops by the interpretation of contracts by the courts is always going to be fragile. Rather than an overarching view being taken of the balance that should be reached between creditors, and the underlying policies driving this balance, the development of the law is at the mercy of the ingenuity of those drafting contracts (who seek to get the best of all worlds) and the vagaries of which cases come before the courts and in what circumstances. The courts are, naturally, concerned with the case before them and the interpretation of the contract before them. The two cases discussed in this article are cases in point. It is contended here that the time has come for a more wholesale overhaul of the law in this area, with overt consideration of policy issues. The two cases illustrate that, without such an overview, the ROT structure is proving incompatible with the SGA, which is a product of 19th century codification and which was drafted without any concept of the way in which the transfer of property would be manipulated by parties. The desire of sellers (and buyers) to have a straightforward commercial relationship while the buyer is solvent, and the relationship of secured creditor and debtor when the buyer is insolvent may not be possible to achieve just by that manipulation.

3. The *Caterpillar* case

a) The background

This case will be dealt with relatively briefly here as the author has criticised the decision at length elsewhere.[30] It concerned a Seller who sold generators to a Buyer[31] who, in turn, sub-sold them to its

[28] s.859H Companies Act 2006

[29] In a fairly recent small-scale empirical survey undertaken by the author, two examples of this came from a supplier of bedding plants and a supplier of soft fruit, both of whom answered that they do not include an ROT clause in their sale agreement for this reason.

[30] Gullifer, L., "The Interpretation of retention of title clauses: some difficulties" [2014] L.M.C.L.Q. 564

[31] These terms are used despite the decision of the majority of the Court of Appeal that the contract was not one of sale, as they were the terms used in the actual contract (hence the capital letters).

Nigerian subsidiary. The sale was on terms granting credit for a stipulated period from the invoice, and provided that property in the goods was not to pass until payment, though the Buyer was permitted to resell the goods. After the credit period had expired, the unpaid Seller sued the (solvent) Buyer for the price. The Buyer realised that it could not set off its cross-claim (for breach of contract) against payment of the price;[32] it therefore, argued that the price was not payable, on the grounds that s.49 of the SGA set out the only circumstances in which a seller of goods could sue for the price, and that neither subsection of s.49 was fulfilled.[33] This section is so critical to both this case and the *Bunkers* case that it is set out in full here:

> "(1) Where, under a contract of sale, the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.
>
> (2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed and the goods have not been appropriated to the contract."

The Buyer argued that property in the goods had never passed to it, since the effect of the terms of the contract was it sub-sold the goods as the agent of the Seller, and property passed straight through to the Sub-Buyer without ever passing to the Buyer ('the agency construction'). The Seller argued for an alternative construction: that both contacts were contracts of sale: the Buyer made its authorised subsale on its own behalf, with the result that property passed first to the Buyer and then to the Sub-Buyer ('the commercial construction'). The Seller also argued that an action for the price could be brought even if neither subsection of s. 49 were fulfilled.

b) The decision of the Court of Appeal

The contract between the Seller and the Buyer contained two potentially contradictory clauses. One, the ROT clause, provided that "Until such time as title passes, Buyer shall hold the products ***as Seller's fiduciary agent***[34] and shall keep them separate from Buyer's other goods. Prior to title passing Buyer shall be entitled to resell.. the products in the ordinary course of business and shall account to the Seller for the proceeds of sale'. Another clause provided that 'Nothing herein contained shall be deemed to create ***an agency,***[35] ….. or fiduciary relationship between the parties hereto'. Although in the light of such ambiguity one might have thought that the courts would "prefer the construction which is consistent with business common sense",[36] in fact, a majority of the Court of Appeal decided to adopt the agency construction, on the basis that this was a literal construction of the ROT clause.[37]

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[32] This was because of a no set-off clause in the contract.
[33] The Seller does not appear to have argued very strongly that subsection (2) was fulfilled.
[34] Emphasis added
[35] Emphasis added
[36] *Rainy Sky v Kookmin Bank* [2011] UKSC 50 at [21] and [30]; [2011] 1 W.L.R. 2900.
[37] Popplewell J at first instance, and Longmore LJ (dissenting in the Court of Appeal) preferred the commercial construction.

c) Criticism of the agency construction

I have argued elsewhere that the agency construction is wrong as a matter of interpretation as it gives rise to a number of uncommercial consequences.[38] One such consequence the contract between the Seller and the Buyer is one of agency rather than a contract for the sale of goods: the sale of goods contract is between the Seller and the sub-buyer.[39] The agency construction also has the result of upsetting the balance in interests described earlier,[40] particularly between suppliers of goods and receivables financiers. It is likely to result in the Buyer holding the entire proceeds of sale on trust for the Seller,[41] which would give the Seller a windfall, but would not be registrable as a charge, and so would not be public. The potential priority conflict between the Seller and a financier financing the receivables of the Buyer would probably (though not definitely) be governed by the rule in *Dearle v Hall.*[42] This is a most unsatisfactory situation for a non-notification receivables financier who would then either have to protect itself by giving notice to the debtor[43] or by entering into waiver or subordination agreements with any seller supplying goods on such terms. This, and the necessary checking of contracts financed in this way, would be likely to push up the cost of receivables financing.

d) S.49 of the Sale of Goods Act

The fault lines between the use of ROT clauses and the SGA are particularly evident in the other aspect of the *Caterpillar* decision. All four judges held that s.49 of that Act constituted a complete code governing when a seller can sue for the price of goods. Arguably, it was this aspect of the decision which led to the unfortunate decision in the *Bunkers* case. Leaving aside the complexities,[44] the result is that a seller who sells on ROT terms will only be able to sue for the price if property passes for some reason other than payment,[45] unless the contract contains a provision which falls within s.49(2).[46] On the agency construction in *Caterpillar*, the Seller could never sue for the price. Of course, on the 'commercial construction', the Seller could sue for the price once property passed to the Buyer, which would be immediately before it passed to the Sub-Buyer. However, even on that analysis, the Seller would be deprived of an action for the price before the goods were sub-sold and if, for some reason, that never happened, the Seller would not be able to sue for the price at all. Longmore LJ considered various other possible causes of action the Seller might have, but concluded that in many

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[38] See Gullifer, L.,"The Interpretation of retention of title clauses: some difficulties" [2014] L.M.C.L.Q. 564 at 568-572

[39] For discussion of this argument, see Gullifer, L.,"The Interpretation of retention of title clauses: some difficulties" [2014] L.M.C.L.Q. 564 at 570 – 571.

[40] 2(c)(i).

[41] An agent will not always hold the proceeds of sale on trust (*Angove's Pty Ltd v Bailey* [2016] UKSC 47; [2016] 1 W.L.R. 3179) but here it is likely that a term to that effect would be implied, as otherwise the obligation to account seems to add little or nothing to the obligation to pay the price.

[42] (1828) 1 Russ. 1; 38 E.R. 475. For discussion, see Beale, H., Bridge, M., Gullifer, L. and Lomnicka, E., *The Law of Security and Title-Based Financing*, 2nd edn (Oxford: Oxford University Press, 2012) Para 14.19.

[43] Which *ex hypothesi* it would be unwilling to do, given the basis of the financing.

[44] For a more detailed discussion, see Gullifer, L.,"The Interpretation of retention of title clauses: some difficulties" [2014] L.M.C.L.Q. 564, 575-579.

[45] As would be the case, for example, if the analysis set out in 6(b) below is adopted.

[46] The interpretation of s.49(2) has been a matter of some debate (*Caterpillar* CA at [44], *Bunkers* first instance at [71] – [73]) but it is hard to see how a liberal interpretation covering payment 'within so many days of invoice' is consistent with the phrase 'irrespective of delivery', while buyers are unlikely to agree to a clause requiring payment on a specific date.

circumstances none would be available.[47] While recognising that this was an unsatisfactory state of affairs, he commented sanguinely "That is just an inherent result of a retention of title clause and shows that it has dangers as well as benefits".[48] The functional analysis discussed below[49] would, however, overcome these difficulties.

The upshot of the *Caterpillar* decision on s.49 is that, if a ROT clause is included in a contract of sale, the seller will be deprived of an action for the price, at least in some circumstances. However, as mentioned above, ROT clauses are used primarily to protect sellers in the event of the buyer's insolvency; if the buyer is not insolvent, a seller would normally want to sue for price and not repossess the goods. This is for a number of good reasons: for example, the goods may have declined in value or the seller may have assigned its receivables to a financier who will not want to repossess the goods. The decision illustrates baldly how the manipulation of property using ROT clauses moves away from the pattern of sale of goods underlying the SGA. It is clear from the wording of s.49 and the cases decided under it that it is envisaged that property will pass on delivery, and that that the section is to protect a buyer who has not had the goods delivered from an action for the price unless he has specifically agreed to pay irrespective of delivery.[50]

The Supreme Court in the *Bunkers* case did overrule the Court of Appeal in the *Caterpillar* case on this point, and held (albeit *obiter*) that s.49 was not an exclusive section.[51] However, for the reasons identified below,[52] this overruling does not really solve the problem. Welcome though the Supreme Court's ruling is, it should not obscure the point made in this paper, which is that the interface between ROT clauses and the SGA is no longer fit for purpose.

4. The *Bunkers* litigation

a) *Bunkers*: a global crisis

The global market for bunkers (fuel oil) was rocked by the insolvency of one of the world's largest suppliers, the OW Bunker (OWB) group. The OWB companies acted as middlemen in the process of supplying bunkers to ships. They entered into contracts to supply bunkers to shipowners and charterers ('bunker users'[53]), and then sourced the actual bunkers from physical suppliers. Sometimes, more companies were involved in the chain, but there were essentially three main parties or categories of parties: the physical suppliers (who delivered direct to the ship) ('physical suppliers'), the OWB company or companies ('OWB'[54]) and the ultimate bunker users. On the insolvency of the OWB group, OWB ceased payments under its contracts with physical suppliers. Many physical suppliers then sought payment directly from the bunker users and, in some cases, took steps to arrest

[47] *Caterpillar* CA at [54] – [55]. Any such actions would sound in damages, and would in any case less attractive to a seller than a claim in debt, since it would be subject to the rules on remoteness and mitigation.
[48] *Caterpillar* CA at [56]
[49] 7(c).
[50] Gullifer, L.,"The Interpretation of retention of title clauses: some difficulties" [2014] L.M.C.L.Q. 564 at 577.
[51] *Bunkers* SC [58]
[52] 4(b)(c).
[53] This neutral terminology is adopted so as to be appropriate for analysis of the Supreme Court's decision, although this article argues that the bunker users are buyers.
[54] This acronym is used to simplify the description and analysis, but it must be remembered that many of the contracting parties were OWB subsidiaries and that sometimes there was more than one OWB company in the chain.

the ship or assert a maritime lien. Moreover, the assignee of the receivables owed to OWB[55] also sought payment from the bunker users, who were the contractual counterparty to OWB. Bunker users became very concerned that they would have to pay twice for the same bunkers.

The cases around the world which have arisen as a result of this situation have varied in result and reasoning, depending on the procedure adopted and the substantive law applied. However, with the exception of the English case, most (if not all) of the cases in common law jurisdictions[56] have involved some consideration of the claim of the physical suppliers, and many have involved a comparison of the merits of the claims of the competing claimants, albeit, in many cases, at a preliminary stage.[57] Most of the substantive decisions have dismissed the claim of the physical suppliers, and expressly or impliedly confirmed the entitlement of OWB, although there are some (arguably distinguishable) exceptions.[58]

b) The UK Supreme Court decision

a) The procedural history

Against this global background, the UK case arose in a rather unusual way. Both the physical suppliers and OWB had demanded payment from the bunker users.[59] Rather than use a process which would bring all parties before a tribunal, the bunker users decided to bring arbitration proceedings against OWB for a declaration that they were not obliged to pay them. The physical suppliers were not a party to these proceedings, and do not appear to have been active in pursuing their claim against the bunker users,[60] although they did make written submissions to the Court of Appeal supporting the latter's arguments.[61] Thus the arbitrators had to consider an argument from the bunker users that, although they had taken delivery of and consumed the bunkers, they were not liable to pay the price to their immediate counterparty, rather than taking the more holistic approach of considering to whom the bunker users were actually liable. Moreover, in order to make a cogent argument at all, the bunker users had to rely on some very unattractive, reasoning.[62] Not surprisingly, the argument

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[55] This was, in most cases, ING Bank, who was the security agent under the OWB syndicated revolving facility. Since nothing turns on this assignment, 'OWB' will be used here to include the assignee.

[56] A comprehensive survey of cases in civil law jurisdictions has not been attempted for the purposes of this article.

[57] Singapore: *Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd* [2015] 4 SLR 1229; [2015] SGHC 187; *The 'Xin Chang Shu'* [2015] SGHCR 17; [2016] SGHC 16. Hong Kong: *Newocean Petroleum Co Ltd v OW Bunker China Ltd* [2016] HKEC 1277; *Newocean Petroleum Co Ltd v OW Bunker China Ltd* [2016] HKEC 1469; *Newocean Petroleum Co Ltd v Rio Tinto Shipping (Asia) Pte Ltd* [2016] HKEC 879. Canada: *Canpotex Shipping Services Limited v. Marine Petrobulk Ltd. et als.* 2015 FC 1108. US: *Hapag–Lloyd Aktiengesellschaft v. U.S. Oil Trading LLC* 814 F.3d 146; *O'Rourke Marine Services LLP v M/V COSCO Haifa, IMO* 15–cv–2992 (SAS); *Martin Energy Services, LLC v. M/V Bourbon Petrel* United States District Court, E.D. Louisiana.

[58] In the Canadian case of *Canpotex*, the court held that the physical suppliers had a valid claim (on the basis that its terms and conditions, giving it a direct right against the bunker users, were incorporated into and varied the contract between OWB and the bunker users) and that OWB did not have a valid claim. See also the two Hong Kong cases referred to in the previous footnote. These decisions are very preliminary, and (it is submitted) the claims of the physical suppliers are unlikely eventually to succeed.

[59] This term refers to two companies: PST Energy 7 Shipping LLC (the owner of the ship) and Product Shipping & Trading S.A. (the manager of the ship), which were treated as one for the purposes of the case, see *Bunkers* first instance [4].

[60] *Bunkers* SC at [9] and [39]

[61] *Bunkers* CA at [15]. The Court of Appeal did not consider these submissions in detail, see [40].

[62] For example, the argument that that property *would* have passed on payment but then be backdated to the time of delivery (*Bunkers* CA at [15], *Bunkers* SC at [30]). This is an unsustainable argument on any view.

took a rather strange form and was rejected by the arbitrators, and the courts at all levels. Unfortunately, in achieving the sensible and unremarkable result that the bunker users were liable to their immediate counterparty, the arbitrators and the courts concluded that the contract between the bunker users and OWB was not a contract for the sale of goods, a line of reasoning which has far reaching consequences.

b) The arguments

The bunker users argued that property in the bunkers never passed to them, and therefore an action could not be brought for the price under s.49 of the SGA, which, because of the *Caterpillar* decision, must be seen as exclusive. Anticipating the argument that, if s.49 did not apply, there must be some other way in which a seller can be remunerated, they also argued that the sellers were in breach of the term implied by s.12 of the SGA, since they were never in a position to transfer property in the goods to the bunker users, and so they could not maintain any action under the sale contract. OWB sought to undermine these arguments at their root, by arguing that the contract was not a sale of goods contract at all, but rather a contract for the supply of bunkers to be consumed. Payment, therefore, was owed as a contractual debt, and neither s.49 nor s.12 applied.

The decision of the arbitrators was made on the basis of assumed facts, and dealt with a series of preliminary issues. The appeal to the courts was on an agreed basis, and was made in relation to specified questions of law. As the appeals went up through the courts, the questions became fewer, and the Supreme Court was only asked to consider two questions: whether the contract between the bunker users and OWB was a contract for the sale of goods within the meaning of s.2 of the SGA, and, if it were, whether OWB could sue for the price despite not falling within s. 49. This latter point was raised by OWB in the Supreme Court on the basis that the *Caterpillar* case was wrongly decided.

c) The Supreme Court decision

The Supreme Court agreed with the arbitrators, the judge at first instance and the Court of Appeal in holding that the contract was not a contract of sale. Lord Mance reasoned as follows.[63] Once the bunkers ceased to exist property in them could not pass. Since it was envisaged that all or substantially all the bunkers would be consumed before end of the credit period (and, by inference, payment), property would never pass in those bunkers. Given the definition of a sale of goods contract in s.2(1) of the SGA,[64] the contract could not, then, be a contract for the sale of goods. It was, however, a *sui generis* contract "to permit consumption prior to any payment…and…if and so far as bunkers remained unconsumed, to transfer the property in the bunkers so remaining…in return for…the price".[65] As a result, the obligation to pay the price is not affected by s.49 and is merely a contractual obligation in debt. Moreover, OWB could not be in breach of any term, whether implied by s.12 of the SGA or otherwise, that it had the right to sell, or transfer property in, the goods since transfer of property was not the essence of the contract. All OWB had promised was to confer permission to use the bunkers, and its only implied undertaking was that it had the legal entitlement to confer such

[63] *Bunkers* SC at [26] – [37].
[64] "a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price".
[65] *Bunkers* SC at [28]. The reference to 'price' here is the price for all the bunkers, not just the amount in relation to which property is transferred.

permission: this was fulfilled on the assumed facts.[66] There was no argument before the court that OWB did not have a right to permit use, nor (unlike in the cases in other common law jurisdictions mentioned above) did the court need to consider whether the bunker users were liable to the physical suppliers.[67] Unfortunately, the reasoning of the Supreme Court has led to the first of these arguments being pursued elsewhere, with some degree of success, albeit at a preliminary stage.[68]

As mentioned above, the Supreme Court overruled the decision in *Caterpillar* that s.49 is exclusive. This, of course, was strictly *obiter,* since the court had already decided that the contract was not one of sale, but the overruling is expressly stated to be of general significance. Lord Mance acknowledged (rightly, it is submitted) that much, if not all, of the rationale behind both subsections of s.49 was to protect a buyer from being sued for the price before delivery, unless risk has passed.[69] He further commented that the section did not focus on the position where delivery is made but title is reserved until payment of the price and that it focused even less on where the buyer is permitted to dispose of or consume the goods or where they are at the buyer's risk and are destroyed or damaged.[70] He therefore said that there was "at least some room for claims for the price in other circumstances than those covered by Section 49",[71] although "[t]he precise limits of such circumstances…must be left for determination on some future occasion."[72] Therefore, had the bunkers contract been one of sale, the price would have been recoverable by virtue of the express terms in the contract.

While the Supreme Court's statement on s.49 is much to be welcomed, one might wonder why, if the price could have been recovered under the bunkers contract, there was any need to recharacterise the contract as a *sui generis* contract rather than one of sale, the ramifications of which are very significant, as discussed below. If the job could have been done merely by overruling the s. 49 aspect of the *Caterpillar* case, would this not have been preferable? It is submitted that this solution is not to be preferred. In a sale on ROT terms, risk almost inevitably passes on delivery while property, of course, passes much later: it is this very situation which the Supreme Court held would be a typical exception to the exclusivity of s.49. Due to the very extensive use made of ROT clauses the Supreme Court's exception would completely swallow up the rule. Thus, s.49 is left with very little application: it applies only to sales not made credit terms where property passes before or on delivery. The section has been *de facto* reformed on the lines of the Canadian Uniform Sale of Goods Act[73] where the seller's action is limited to after delivery has taken place. Yet again, the lack of 'fit' between the SGA and the use of ROT clauses is demonstrated.

5. Ramifications of the *Bunkers* decision

a) Uncertainty in the bunkers market

Bunker oil could be seen as a specialised kind of goods, so that a contract for its provision is more analogous to a contract for the supply of energy (such as electricity) rather than a normal sale of goods

[66] *Bunkers* SC at [39].
[67] *Bunkers* SC at [39]. Lord Mance noted that the physical suppliers' claim had not been formally pursued.
[68] See the litigation in Hong Kong mentioned in footnote [ ]
[69] *Bunkers* SC at [49].
[70] *Bunkers* SC at [50].
[71] *Bunkers* SC at [53]
[72] *Bunkers* SC at [57]
[73] S.106. See M. Bridge, *The Sale of Goods* (3rd edn, Oxford: Oxford University Press, 2014) [11.70] and Gullifer, L., "The Interpretation of retention of title clauses: some difficulties" [2014] L.M.C.L.Q. 564 at 579.

contract. Thus it could be argued that the decision is limited in its wider application. However, even on this view, the decision is productive of uncertainty. The recharacterisation of the contract as a *sui generis* contract rather than a contract for the sale of goods is based on the wording of the contract, particularly the ROT clause. Without that clause, there seems little doubt that the contract would have been one for the sale of goods. The case, then, draws an unwelcome distinction, on one hand, between the characterisation of contracts for the supply of bunkers where no credit is provided (or where credit is provided but there is no ROT clause) and contracts where credit is provided and a ROT clause is included.

Further, the Supreme Court rejected the analysis of the Court of Appeal that the contract was one for the supply of bunkers to be consumed (to the extent that they were consumed before payment) and one for the sale of goods (to the extent that property was transferred on payment).[74] The Supreme Court, instead, held that the contract had to be seen as one contract. On this view, the length of the credit period, and the likelihood of payment before the end of the credit period, must surely be relevant in determining whether the contract is one for the sale of goods or not. The position of a contract on ROT terms with a very short credit period is very unclear: according to the Court of Appeal, it would seem to depend on whether it was envisaged that more than a 'minimal' amount of the goods would be consumed before payment, or whether the 'overwhelming majority' of the goods would remain at the time of payment.[75] This, however, depends on two imponderables: when will the goods be consumed and when will the buyer pay? It must be remembered that a contract is to be interpreted as at the date at which it is entered into,[76] and subsequent conduct of the parties is only relevant in the case of a sham or a variation.[77] It seems very odd that the parties' view on these imponderables (which are not specified by the terms of the contract) determines whether the contract is one of sale or not, and very unclear as to what the characterisation would be if the evidence was that they did not have a fixed view on these matters. Moreover, if the reality does not match up to the intention (for example, if the goods are not consumed as quickly as envisaged, or are consumed more quickly) does that mean that the parties must be taken to have varied the nature of the contract from or to a contract of sale? Further, where bunkers are sold down a chain of contracts, with different credit periods and terms at different stages of the chain, there is a real possibility that some contracts may be contracts for the sale of goods and others may not.

Does this matter? The great merit of the SGA is that it provides a (largely default) code dealing with many, though not all, contractual and proprietary aspects of contracts of this type, based on the common law at the end of the nineteenth century, with some additions and modifications. It may not be thought entirely fit for purpose, but it is all we have at the moment. It is unclear to what extent a *sui generis* contract as described in the *Bunkers* case would include similar implied terms, or be subject to similar default rules, to those set out in SGA. The Court of Appeal and the Supreme Court were of the view that many such implied terms and default rules would apply to the *sui generis*

[74] *Bunkers* CA at [33]
[75] *Bunkers* CA at [19]
[76] *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583; [1970] 1 All E.R. 796; *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235; [1973] 2 All E.R. 39.
[77] See *A G Securities v Vaughan* [1990] 1 AC 417 at 469 and 475; [1988] 3 All E.R. 1058 at 1072 and 1077 (sham) and S Atherton and R Mokal, 'Charges over chattels: issues in the fixed/floating jurisprudence' (2005) 26 Company Lawyer 10 at 16-17 which discusses the variation analysis in detail.

contract.[78] However, for obvious reasons, they did not go through every provision in the SGA, giving guidance on each one. This is an exercise which has fallen to the editors of *Benjamin on Sale of Goods*[79] and has proved a difficult, complex and sometimes speculative exercise. Some of the main difficulties are outlined in the following paragraph.

The *sui generis* contract might reasonably be thought still to be subject to rules in the SGA which reflect the common law as it was in 1893,[80] any other SGA provisions have to be examined carefully (in the context of the actual contractual terms) to see if they apply by analogy. The contract might fall within a statute which takes a broader commercial view of 'sale'[81] but not within the SGA. Many of the terms implied by the SGA are likely to be implied by analogy,[82] others will only apply if modified. The most obvious example of this is the term implied by s.12(1), which is modified by the Supreme Court into an undertaking that the supplier has the legal entitlement to permit use. That it is not automatic that such an undertaking will be implied into all bunkers contracts on ROT terms is illustrated that the fact that, in relation to the contract between OWB and the physical suppliers, the contrary has been held to be arguable in other jurisdictions,[83] and was a matter left open by the Court of Appeal and the Supreme Court.[84] Even if terms are implied, it is not a given that they will have the status conferred upon them by the SGA, so that in each case it falls to be considered whether they are conditions, intermediate terms or warranties.[85]

Further, provisions in other statutes which specifically apply to the SGA will not apply to the *sui generis* contract. The most obvious are the restrictions on unfair terms found in s.6 of the Unfair Contract Terms Act 1977 ('UCTA').[86] This results in a substantive difference between the treatment of such terms in a sale of goods contract and in a *sui generis* contract. Although the latter will still be governed by s.3 UCTA, this applies the reasonableness test to all exclusions or restrictions of liability, while exclusion or restriction of liability for breach of the terms implied by s.12 SGA is automatically unenforceable under s.6. Further, s.3 is limited to contracts on the written standard terms of business of the party relying on the 'unfair' term, while s.6 is not so limited.

Not only does the situation described lead to considerable uncertainty, it also may be productive of a 'pick and mix' approach to the code in the SGA. While the terms of the Act can certainly be criticized, it is, at least, a reasonably coherent code. Although many of the provisions can be contractually excluded or altered, the Act provides a starting point for doing this. If contracts are *sui generis*, then the parties will have much greater freedom to include whatever provisions they choose: for example,

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[78] *Bunkers* CA at [33]; *Bunkers* SC [31].
[79] In writing the 2nd supplement to the 9th edition
[80] For example, ss.29(4) and 32(1).
[81] For example, the Factors Act, first enacted in 1877 (se *Bunkers* CA at [33]). For detailed discussion of the consequences of this, see M Bridge (ed), *Benjamin's Sale of Goods* 9th ed., London: Sweet & Maxwell, 2014) 'Benjamin 9th edn' 2nd supplement 7-032 footnote 202, 7-034 footnote 234a, 7-055 footnotes 361a-d and 7-069 footnotes 446a-e. [ ]
[82] Such as the terms as to compliance with description, quality, fitness for purpose and conformity with sample) in ss.13 – 15.
[83] See the Hong Kong cases referred to in footnote [ ]
[84] *Bunkers* CA at [38], *Bunkers* SC at [39]
[85] See Benjamin 9th edn, 2nd supplement 4-002 , 4-025, 4-030 [ ]
[86] See Benjamin 9th edn, 2nd supplement 4-002 footnote 16e [ ]

by combining some 'SGA like' terms with terms taken from other commercial codes or legislation, which may not fit well together at all.

b) Wider implications of *Bunkers* and *Caterpillar*

It is not the case, however, that the *Bunkers* decision can be restricted in its scope to cases about bunkers, any more than the agency construction in *Caterpillar* can be limited to contracts on exactly the same terms. Not surprisingly, cases on the interpretation of ROT clauses have been used over the years as guidance for contracting parties and precedents for the courts, and rightly so. It is only by the building up of precedential reasoning that the balance described earlier has been reached by the case-law, and a reasonable degree of certainty has resulted for the market. The *Bunkers* decision, being a case of the highest authority, will clearly be relied upon by future contracting parties, and by all litigants who feel it would be of their advantage to do so.

The crux of the *Bunkers* decision is that contracts for the supply, on ROT terms, of goods in which property cannot pass when payment is made are not sale of goods contracts but *sui generis* contracts. It is submitted that this category of contracts is very wide indeed. In most sale transactions concerning raw materials or stock in trade, the credit period will be longer than the time the buyer is likely to keep the goods intact in its possession, since buyers will wish to minimise the storage of unproductive goods, but also to obtain as long a period of credit as possible. In addition, many ROT clauses are 'all moneys' clauses, which provide that property will not pass until all sums due to the seller have been paid. It is almost inconceivable in such a case that ordinary inventory would not have disappeared well before property is intended to pass.

The ways in which this 'disappearance' can occur are various.[87] In some cases, the goods will literally have been destroyed, such as when food or drink supplied to a restaurant will be eaten, or fuel is burnt. In other cases, they will have lost their identity by being combined into a new product or incorporated into real property. In other cases, they will have been resold to a sub-buyer. Once these events have taken place, it will be no longer possible for property in the goods to pass to the buyer. Arguably, then, since the Supreme Court decision, in all of these cases the supply contract is not a contract for the sale of goods, but a *sui generis* contract including a license to do whatever it is that renders it impossible to pass property at the time of payment.[88] The *Caterpillar* decision adds the further possibility that contracts (on ROT terms) where the goods are to be resold are not contracts of the sale of goods but contracts of agency. Given that supply of goods on credit terms is extremely widespread, and, in that context, ROT is ubiquitous, and given that the SGA no longer applies to consumer contracts, one wonders what contracts are actually included within its scope.[89] Moreover, the uncertainties mentioned earlier[90] would arise in relation to all of these *sui generis* contracts. There seems to be little doubt that the English law concerning sales on ROT terms is broken, given that such sales will henceforth hardly exist.

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[87] A. Tettenborn, in his excellent note 'Of Bunkers and Retention of Title: When is a Sale Not a Sale?' [2016] L.M.C.L.Q. 24 has some colourful examples at 26.

[88] Tettenborn delightfully calls a contract for the supply of wine from Messrs Berry Bros & Rudd as including an undertaking to provide a 'license to tipple'.

[89] It should also be remembered that most big ticket goods are often supplied by the use of other types of finance contracts: hire purchase or finance or operating leases, and thus sale contracts in that context are relatively rare as well.

[90] 5(a)

6. Possible responses

a) Three responses

Three possible responses to the 'broken' state of the law are discussed in this section. The first is an alternative analysis of the passing of property, namely, that it passes immediately before the goods are destroyed or resold. The second suggests that, if the analysis of the Supreme Court in the *Bunkers* case is accepted and applied as generally as discussed in 5(b) above, the time might have come for a complete redrafting of the SGA to cover every way in which goods, services and digital content can be supplied by and to businesses. The third is that the time may have come to acknowledge that ROT clauses are what they really are, namely an attempt to create security for the seller in the event of the buyer's insolvency, and that the policy imperatives underlying the law in this area should be exposed and considered properly.

b) A re-analysis of the passing of property[91]

Until the decision in the *Caterpillar* case the usual analysis of a contract for the supply of stock in trade was that property in the goods passed to the buyer at the moment of sub-sale and then passed to the sub-buyer. This was the analysis adopted by Popplewell J[92] and Longmore LJ[93] in that case, though not by the majority of the Court of Appeal. Similarly, where goods are consumed or materials used in manufacturing so that they no longer exist, property passes at or immediately before the moment of extinction. The seller is then left with an (unsecured) claim for the price. This analysis could also apply to a chain of contracts as in the *Bunkers* case: each contract is a contract for the sale of goods, with an implied term that property passes (down the chain) when the bunkers are used, since at that moment each seller loses its 'security' for the price. There would then be no problem for the seller (in each contract) relying on s.49(1) to sue for the price. An implied term to this effect was rejected by Males J[94] on the grounds that the contracts provided expressly for the passing of property on payment and no term could be implied which contradicted this; the Supreme Court briefly endorsed this view.[95] However, the approach taken in the *Bunkers* decision does far more damage to the express wording of the contract (by completely changing its nature) than implying this sensible term, which, arguably, is an obvious qualification to the express terms. It is, in fact, so obvious that it appears to have been assumed *sub silentio* in many cases concerning ROT clauses over the years,[96] and applies equally to cases where goods are resold, where they are incorporated into products or real estate, and where they are destroyed or consumed.

This analysis also helps explain another difficulty with the Supreme Court's interpretation of the contract. The label of 'sale' was disregarded as it was said to be inconsistent with the ROT arrangements because the goods would be destroyed before the end of the credit period. However,

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[91] This solution was suggested by the author and Professor Hugh Beale in a blog on the Court of Appeal decision in the *Bunkers* case (see https://www.law.ox.ac.uk/research-subject-groups/commercial-law-centre/blog/2015/11/when-sale-not-sale-%E2%80%98bunkers%E2%80%99-court-appeal) and by Professor Tettenborn [2016] L.M.C.L.Q. 24 at 26 – 27.

[92] *Caterpillar* first instance at [57] – [60].

[93] *Caterpillar* CA at [22] – [25].

[94] *Bunkers* first instance at [67].

[95] *Bunkers* SC at [28].

[96] Some of the cases which appear to assume the correctness of this analysis were cited and considered in the *Bunkers* decisions, but were rejected as having any precedential value on the basis that this particular point was not in issue, see *Bunkers* first instance at [32] – [34], *Bunkers* SC at [35]

viewing the contract as a whole, this makes the ROT clause almost without application. Once the bunkers have been consumed, there are no goods to which title can be retained. Thus, if the bunkers are consumed before the end of the credit period the ROT clause is useless. It is only if there are bunkers left over at the end of the credit period, and also the price is not paid that the ROT clause has any bite.[97] The ROT clause was, therefore, either of virtually no use at all (in which case, relying on it as changing the characterisation of the contract might be thought to be a severe case of the tail wagging the dog) or it was inserted to give protection where bunkers were left over after the end of the credit period[98] (in which case this possibility should have featured more in the interpretation of the contract). This dilemma is, at least in part, solved if the analysis in the previous paragraph is used. The clause should have provided for the passing of property on use or payment, whichever was earlier and this, while, maybe not providing a great deal of proprietary security, at least would have made coherent sense.[99]

Further, the analysis suggested here reflects the intentions of the parties in most, if not all, situations where goods are sold on ROT for the purposes of resale, and is therefore preferable to the 'agency construction' adopted in the *Caterpillar* case. That the incidents of an agency construction are unlikely to be intended by the parties has been argued in detail elsewhere.[100] Where the parties actually intend to create an agency, this can be done (and should be done) by very clear words, setting out that the incidents of an agency relationship are actually intended by the parties.[101]

c) Redrafting of the Sale of Goods Act

It has always been a truism that goods can be supplied from one person to another without the contract being one of sale. The recipient of goods often only wants possession of the goods, and the right to use them, and does not need a transfer of ownership to achieve its practical purposes. Roman law made a bright line distinction between contracts of sale, contracts for the hire of goods and for the hire of services, although it was acknowledged by the jurists that there were some situations where characterisation was difficult.[102] For the Romans, this was particularly problematic since it was critical to bring the correct action in order to obtain a remedy. English law is more flexible: it has never been a bar to suing on, for example, a contract of barter that it did not fall within the SGA.[103]

Thus, contracts of hire have always been a popular way for a person to acquire equipment (that is, goods used for relatively long term functions which do not entail their destruction). The concept of hire has, in more recent times, been manipulated to enable financiers of such equipment to secure the obligations owed to them by those acquiring the equipment. The contract of conditional sale,

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[97] Even at this stage, unless the buyer is insolvent, the seller will usually want to sue for the price rather than enforce its ROT clause.

[98] Of course, it is possible that the contract also contained a clause that it was terminable on an earlier event of default (such as the insolvency of the bunker user), in which case the price might become payable before the end of the credit period.

[99] A version of this argument is made by Tettenborn [2016] L.M.C.L.Q. 24 at 27.

[100] See Gullifer, L.,"The Interpretation of retention of title clauses: some difficulties" [2014] L.M.C.L.Q. 564, 568-572. That the issue may be open to reconsideration was hinted at by Lord Mance in the *Bunkers* decision at [57].

[101] See, for example, the contract in *Angove Pty Ltd* v *Bailey* [2013] EWHC 215 (Ch) (the judge's finding that the contract was one of agency was not appealed)

[102] See Institutes of Gaius, Book 3, paragraphs 145-147 and Institutes of Justinian, Book 3, chapter 24 paragraphs 3 – 4.

[103] Benjamin, 9th edn, 1-034 – 1-038.

originally used in this way to acquire equipment,[104] was largely replaced by that of hire purchase in order to avoid the consequences of s.9 of the Factors Act 1889.[105] More recently, the finance lease (a long term lease where the lessee pays the cost of the goods plus a financing charge but never obtains title) was developed.[106] One of the most difficult lines to draw (even in Roman times[107]) has been the line between a contract of sale and a contact for the supply of work and materials.[108] This is particularly true where the materials are to be affixed to the land of the recipient, since property will pass by accession and not under a contract of sale.[109]

English law has long acknowledged the close relationship between all these types of contracts, which are used for the supply of goods to businesses (and, to some extent, to consumers), and contracts of sale. Legislation has therefore been enacted to include the same (or similar) implied terms in these contracts as in contracts for the sale of goods,[110] and some other aspects of sale law have also been applied to some of these contracts.[111] These legislative provisions now apply only to contracts for the supply of goods to businesses: supplies to consumers fall under the Consumer Rights Act 2015.

It could therefore be argued that the worst uncertainties arising from the new *sui generis* contract could be sorted out by a similar piece of legislation. The contract would, of course, have to be defined clearly, and the lines between it and other contracts which fall under different provisions drawn with a certain degree of precision. However, provided that the terms implied were similar, demarcation disputes could be kept to a minimum. The implied terms as to quality could be virtually identical to those in the SGA. The most difficult implied term to deal with would be that analogous to that implied by s.12 of the SGA, since this could not be identical. The equivalent provision in relation to contracts of hire implies a term that the hirer has the right to transfer possession of the goods by way of hire:[112] the provision in relation to the new *sui generis* contract could therefore imply a term that the supplier has the right to transfer possession and to permit consumption. However, the term would also have to include the right to transfer property[113] in relation to those goods which are still in existence when the price is paid. A term promising quiet possession[114] would also need to be implied,[115] and probably,

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[104] And developed to enable financiers to avoid falling within the Bills of Sale Acts 1878 and 1882, see *McEntire v Crossley Bros* [1895] A.C. 457.

[105] This enables a good faith buyer from a conditional buyer to obtain good title under certain circumstances and was the forerunner of s.25 SGA. The case of *Helby v Matthews* [1895] A.C. 471 confirmed that the avoidance was successful.

[106] It is often hard to distinguish from a long term operating lease; international accounting standards will soon require both types of leases to appear on a company's balance sheet, see IFRS 16 (Leases), effective from January 2019.

[107] Institutes of Gaius, Book 3, paragraph 147; Institutes of Justinian, Book 3, chapter 24 paragraph 4.

[108] Benjamin 9th edn 1-042.

[109] Benjamin 9th edn 1-043.

[110] Supply of Goods (Implied Terms) Act 1973, Supply of Goods and Services Act 1982.

[111] Thus, Part III of the Hire Purchase Act 1964 provides a limited exception to the *nemo dat* rule in relation to conditional sale and hire purchase agreements relating to motor vehicles, and ss 6 and 7 UCTA apply the same restrictions on limiting or excluding liability for breach of the implied terms as apply to sale of goods contracts.

[112] S.7 Supply of Goods and Services Act 1982

[113] *Ex hypothesi* the term could not imply a right to *sell.*

[114] Equivalent to s.12(2) SGA. See also s.7 Supply of Goods and Services Act 1982.

[115] Males J took the view that no warranty of quiet possession should be implied in the *sui generis* contract, see *Bunkers* first instance [63]. However, this was on the basis that all the bunkers would be used before payment, which is not necessarily the case in all such contracts. Furthermore, the recipient of the goods surely requires redress if a third party claims the goods before it has had a chance to consume them, see Benjamin 9th edn 2nd supplement 4-025[ ]

in relation to goods in which property could or would pass, a term promising freedom from encumbrances.[116] Care would have to given to the question of whether these terms should be warranties, conditions or intermediate terms. It is certainly arguable that they should be intermediate terms, since the harm suffered from breach could be considerable and should give rise to the right to repudiate the contract.[117]

The difficulty in drafting the equivalent to s.12 SGA shows that even this modest legislative 'tidying up' would not be easy. Moreover, given the potentially wide application of the '*sui generis* contract' analysis, this legislative response is arguably not enough. Most contracts for the supply of inventory, including those involving international supply, would be included in this analysis if English law governed. In order to 'tidy up' the law, it would be necessary to reproduce most, if not all, of the provisions in the SGA rather than just the implied terms, suitably modified to deal with this new contract.

It might be thought, then, that this is just the impetus needed to lead to an entire redrafting of the SGA as a much wider statute dealing not only with the sale of goods, but with all circumstances in which goods are supplied to businesses. In fact, a new statute could also include the supply of services and digital content, in a manner analogous to the Consumer Rights Act 2015,[118] although the overall scope should be wider than the Consumer Rights Act, and deal with proprietary and other issues. There have been calls for an overhaul of the SGA for many years,[119] and now that consumer transactions have been extracted, it may be that the time is ripe for a modern statute which reflects the ways in which goods are actually sold and supplied to businesses today, rather than the state of the market in the late nineteenth century, with various accretions to deal with the more egregious disjunctions between the statute and real life. Consideration could also be given afresh to ratifying and adopting the UN Convention on Contracts for the International Sale of Goods 1980, although it is not clear that the Convention, by its terms, would apply to the *sui generis* contract since Article 30 provides that the seller's obligations include one to 'transfer the property in the goods, as required by the contract and this Convention'.[120]

It would be possible to accommodate the *sui generis* contract in such a new statute. The question, then, is whether this is the best way forward. It would, of course, be an enormous amount of work, and take a great deal of time for such a new statute to be drafted and enacted. It might, therefore, be questioned whether it is really necessary, or even desirable. Moreover, even if the *sui generis* contract were described in detail and its incidents provided for, it can be argued that this is not the optimal approach. It could be argued that the new contract is really not a new type of contract at all, but rather an ordinary, standard, sale of goods contract with just one thing added: a proprietary right in the goods sold which gives the seller credit protection on the insolvency of the buyer. In other words, it is a sale of goods contract coupled with a security interest in the goods. The next section

[116] Again, equivalent to s.12(2) SGA, though not found in Section 7, Supply of Goods and Services Act 1982.
[117] Benjamin 9th edn 2nd supplement 4-024 and 4-025. [ ]
[118] Though it should be noted that the difficulties of finding a consistent terminology and grammatical construction which covers all these different types of contracts should not be underestimated, see Benjamin 9th end 14A-039.
[119] For example, M. Bridge, 'What is to be done about sale of goods'? (2003) 19 L.Q.R 173
[120] Article 4, however, expressly states that 'This Convention…is not concerned with…the effect which the contract may have on the property in the goods sold.'

builds on this line of reasoning and examines whether a better approach is one which takes account of the function of the ROT clause, rather than the formal structure involving the manipulation of the passing of property.

d) ROT clauses: a functional analysis

i. Introduction

A security interest is a proprietary interest which a creditor has in an asset of the debtor to secure an obligation owed to him by the debtor (or another party).[121] The whole point of a non-possessory security interest is that it does not stop the debtor using the asset for the purposes of its business until the creditor needs to, and does, enforce it; in reality, this is usually on the insolvency of the debtor, at which point the secured creditor is in an advantageous position because of its proprietary interest. Modern secured transactions law in most jurisdictions includes a type of security interest which can be taken over inventory, so that it can be disposed of by the debtor in the ordinary course of business without the consent of the secured creditor. The point of such an interest is that, unless and until the debtor defaults (and usually also becomes insolvent) it can do virtually everything it could do with the inventory were it the owner.[122] English law was the first to develop such an interest: the floating charge.

It can be seen that what has just been described is functionally what is happening when inventory is sold subject to a ROT clause, particularly an all moneys clause. Unless and until it becomes insolvent, the buyer operates normally, using the inventory for manufacture, or reselling it, or consuming or destroying it: in other words, it operates as if it were the owner of the goods. On non-payment and insolvency, the seller may take steps to assert its proprietary claim. Often, in reality, this assertion is enough : the insolvency officer, who will want to retain the goods in order to carry on the business or to sell it as a going concern, will pay off the seller, who achieves what he really wants (payment) rather than the second best option (the return of the goods). In function, then, the ROT clause over inventory operates as a floating charge.[123]

Applying this functional analysis, in English law terms the ROT transaction would operate as follows. The contract would be a normal contract of sale, and property would pass on delivery, but, in addition, the ROT clause would create a floating charge over the goods in favour of the seller, which would attach to the goods on delivery, when the buyer would become the owner of the goods. Permission to resell or to use or destroy the goods in the ordinary course of business would be inherent in the nature of the charge, and sub-buyers would obtain good title free of the charge. The SGA would apply to the contract with its full force and would need no adaptation.

It might not have escaped the notice of perceptive readers that this is the very analysis adopted by UCC Article 9 and the various Personal Property Security Acts of Canada, Australia and New Zealand (the PPSAs).[124] The analysis is, of course, combined with other provisions which overtly create such a

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[121] L. Gullifer (ed), Goode on Legal Problems of Credit and Security (5th edn. London: Sweet & Maxwell 2013) 1-17.

[122] Subject to the acts being within what is usually a very wide definition of ordinary course of business.

[123] The specific differences which come from the jurisprudence surrounding the English law floating charge are ignored here, but will be discussed below.

[124] See, for example, the Australian Personal Property Securities Act 2009 ('APPSA') s.12(2), the New Zealand Personal Property Securities Act 1999 ('NZPPSA') s.17(3) and the Saskatchewan Personal Property Security Act

balance of interests between creditors as is desired as a matter of policy, including registration requirements. Some of these types of provisions are absent in English law, and a functional recharacterisation of a ROT clause over inventory as a floating charge (this will be called, for brevity, an 'ROT floating charge' despite the contradiction inherent in this label) would, then, require some policy choices to be made, and some further reform of the law. The most significant of these policy choices will now be explored.

ii. Super-priority

First, it will be recalled that under current English law, a ROT seller has super-priority in relation to the goods sold over all other interests in those goods created by the buyer, by virtue of the seller's retention of title, and this is justified by the new value that the goods bring into the business.[125] This position, in relation to the credit extended in relation to those particular goods, is replicated in the PPSAs since the ROT seller's interest is characterised as a purchase money security interest ('PMSI'), which has priority over all prior and subsequent security interests. It is suggested that the ROT floating charge should have a similar super-priority as far as it secures the obligation to pay the price of the inventory it covers.

Further consideration would need to be given to the priority position of an all moneys clause.[126] The 'new money' justification does not apply here, except to the extent that the other moneys due to the seller relate to other inventory supplied, and, even then, only if the entire supply of inventory is seen as a whole. There is, however, another justification for super-priority of the interest created by an all monies clause: avoiding the difficulty of identifying which goods have been paid for at the moment of repossession. The use of an all moneys clause in this context is often called 'cross-collateralisation', and has been the subject of specific legislation in some jurisdictions.[127] It would be possible to adopt this approach, or even a more targeted one, whereby super-priority only applied to an interest in goods used for cross-collateralisation if the cross-collateralised goods were interchangeable, that is, fungible.[128]

iii. Insolvency consequences

Second, the very words 'floating charge' strike terror into the hearts of finance lawyers because of the adverse consequences on the chargor's insolvency, most particularly the top-slicing of expenses from the floating charge assets.[129] Should these consequences apply to the ROT floating charge? They do not in New Zealand, to the extent that they are PMSIs.[130] It is suggested that this position should be

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1993 ('SPPSA') s.3(1). Many other countries have now adopted or are adopting PPSAs, particularly in Africa, the Pacific Islands and the Caribbean.

[125] 2(c)(ii).

[126] See 2(c)(iii).

[127] UCC §9-103(b)(2) provides that a security interest in inventory retains its PMSI status to the extent that it secures a purchase-money obligation in relation to other inventory in which the secured party holds a PMSI. In Australia, the usefulness of permitting cross-collateralisation where goods are fungible was pointed out by many submissions to the 2015 Statutory Review of the Australian PPSA, which recommended that a provision similar to the UCC one be included in the Act (para 7.7.8.5).

[128] This is the position in France, see Code de Commerce Art. L. 624-16.

[129] See Insolvency Act 1986, ss. 175, 176A, 176ZA Sch B1 paras 65(2), 70 and 99, and for discussion see Gullifer, L. and Payne, J., *Corporate Finance Law: Principles and Policy* (2nd edn, Oxford: Hart Publishing, 2015) paras 3.3.1.2 and 7.3.3.4.

[130] See New Zealand Companies Act 1993 Sch 7 para 2(1)(b)(i)(B). Preferential claims (including expenses) have priority over, inter alia, security interests in inventory but not those which are perfected PMSIs. The Australian

replicated, at least in relation to a charge securing the price of the goods themselves. The assets affected by the charge are limited in scope (and so do not fall foul of the usual justification of the adverse insolvency consequences: the width of the floating charge), and the secured obligation has brought new value into the company. Further, the seller's interest only extends to a relatively small part of the company's assets (and one which will, *ex hypothesi*, disappear in the ordinary course of business), and the seller will therefore not be in a position to appoint an administrator out of court,[131] and will not have even 'soft' control over the conduct of an administration. The balance of the argument might be different if cross-collateralisation resulting in PMSIs on a large scale were to be permitted: the seller would then have a much more extensive PMSI over the assets of the company and the argument that he should be exempt from compulsory contribution to the expenses of the insolvency is weaker.

iv. Registration

Third, should the ROT floating charge be registrable? Under the PPSAs registration of ROT interests over inventory is required for priority and for validity on insolvency,[132] but the notice filing system operating in those regimes means that a financing statement can be filed in advance of any transaction, and can relate to all transactions between the parties of the type covered by the registration. Registration is also online, easy and cheap. The justification for requiring registration for such interests is to give publicity to subsequent creditors, but because of its super-priority a PMSI also affects prior secured creditors. The PPSAs vary in their approach to the protection of such creditors.

Under the current English law relating to registration of company charges, making a ROT floating charge registrable would be unworkable, since every sale contract would have to be registered, which includes delivering a certified copy of the charge document for registration.[133] This would be far too burdensome for sellers, and the expense would clearly outweigh the benefit. Requiring registration would, therefore, only be desirable if the system were reformed into some form of notice filing system.

Again, the arguments against registration are weaker in relation to an all moneys clause, and the benefits of registration could be said to outweigh the burden. Even then, under the current law other creditors know that inventory (that is, raw materials and goods pending resale or consumption) is likely to be subject to a ROT clause, including an all moneys clause. Requiring registration would, therefore, change the status quo by improving publicity. It would also, under the current registration system, have a chilling effect on the use of all moneys clauses in the same way as currently in relation to clauses purporting to cover products or proceeds, since registration, though possible, is likely to be uneconomic.[134] This, of course, might be seen as a desirable shift in the balance of interests given the width of the reach of such clauses.

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definition is more complicated, but the Statutory Review has recommended a simpler definition, which, in relation to inventory, replicates the New Zealand approach.

[131] Under Insolvency Act 1986 Sch B1 para 14.

[132] Under the NZPPSA unregistered security interests are not void on insolvency.

[133] The ROT floating charge resulting from each contract would also be very short term, which reduces the benefit of registration.

[134] See 2(c)(vi).

v. Accounting for surplus

Fourth, should the ROT floating charge should carry with it an obligation to account for surplus value on enforcement?[135] Although this is a change from the current position, it is suggested that it would be desirable. There is little evidence that sellers of inventory are interested in recovering any value of the goods over and above the amount required to cover the price due. Thus, for example, many are happy to receive the price from an insolvency officer of the buyer rather than the return of the goods. Further, some contracts expressly include a contractual obligation on the part of the seller to account for any surplus on repossession.[136] In any event, the value of the goods themselves[137] is unlikely to be much greater than the amount due, unless the price has been partly paid.[138]

vi. Products and proceeds

Finally, should the ROT floating charge extend automatically to the products or proceeds of sale of the goods supplied? This is the position under the PPSAs, but is in conjunction with a registration requirement. Currently interests in products and proceeds are registrable under English law,[139] and it is suggested that the status quo be retained. Floating charges do not extend into products or proceeds unless expressly extended to do so:[140] it is suggested that the ROT floating charge should be the same, and that any extension should be registrable (as is the case now). In any event, to the extent that interests in products and proceeds are registrable, it is suggested that they do not carry PMSI status, as this would upset the balance of interest referred to earlier,[141] and would be likely to push up the cost of receivables financing.[142]

7. Conclusion

The ramifications of the legal analysis in the *Caterpillar* and *Bunkers* cases are wide-ranging and result in an emasculation of the SGA, and a large degree of uncertainty. This article explores possible responses to these ramifications: its purpose is not, necessarily, to advocate for one response rather than another. In a sense, all the responses identified have merit, and the differences between their desirability are practical rather than legal. The first response, a reanalysis of the passing of property, would not be needed were a functional analysis (the third response) to be adopted. The argument made for a redrafting of the SGA would be less urgent were one of the proprietary responses to be adopted, although this is not to say that in the longer term it would not be a good thing. Practically, however, it would be an enormous and long-term job, and arguably should be part of a global initiative on the law of supply of goods. To be pushed into such a task merely to deal with one particular contractual analysis would be overkill.

That leaves the other two responses. In a sense, the first is easiest to achieve, since this could be done by express provision in future sale agreements, or, in the case of existing contracts, by a more

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[135] See 2(c)(i) where this is called 'the surplus issue'.
[136] *Clough Mill v Martin* [1985] 1 W.L.R. 111 at 117; *McEntire v Crossley Brothers Ltd* [1895] A.C. 457 at 465; *Kinloch Damph Ltd v Nordvik Salmon Farms Ltd* (1999) Outer House Case, June 30, 1999.
[137] As opposed to products or proceeds.
[138] Cf the position in relation to all monies clauses discussed at 2(c)(iii) above.
[139] See 2(c)(iv) and (v) above
[140] L. Gullifer (ed), Goode on Legal Problems of Credit and Security (5th edn. London: Sweet & Maxwell, 2013) 1-61
[141] 2(c)(vi).
[142] 3(c).

commercial interpretation by the courts, rather than requiring statutory intervention. In the long term, though, it might not solve all potential problems, as it still does not properly recognise what ROT clauses are actually there to do. This can only be done if their function as security interests is acknowledged. Thus, the third response is attractive. This article has explored whether it could be adopted without any wholesale change in the law of secured transactions and identified what policy choices would need to be made. There is no doubt, however, that it would be most satisfactorily adopted as part of a more widespread reform of that law, including a registration system which made registration quick, easy and cheap, and which provided for registration in advance of the relevant transaction. Thus this article is a contribution to the reform initiatives being carried out by various research projects in England,[143] which, hopefully, one day will lead to the reform of English law in this area so that it, and the business it supports, remains modern, efficient and able to function well in the twenty-first and into the twenty-second century.

[143] Secured Transactions Law Reform Project, http://securedtransactionslawreformproject.org/ and the draft Secured Transactions Code prepared by the City of London Law Society Financial Law Committee, http://www.citysolicitors.org.uk/index.php?option=com_content&view=category&id=129&Itemid=469